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No. 316

Supreme Court of the United States

OCTOBER TERM, 1943

THE HECHT COMPANY, *Petitioner*,

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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THE HECHT COMPANY, *Petitioner*,

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Hecht Company, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia in the above case entered on July 22, 1943, reversing the decision of the District Court.

OPINIONS BELOW

The findings of fact, conclusions of law, and memorandum opinion of the District Court (R. 441-454) are reported in 49 F. Supp. 528. The opinion of the Court of Appeals for the District of Columbia (R. 604-615) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered July 22, 1943 (R. 616). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 25, 1925.

QUESTION PRESENTED

Whether, despite findings, *inter alia*, that "the defendant and its employees have attempted in good faith to comply with the [Emergency Price Control] Act, and have taken vigorous steps to do so"; that "the compliance thus resulting has been very substantial"; that "there were no wilful violations"; that "mistakes have been corrected as soon as discovered, and vigorous steps have been taken against their happening again"; that "these acts have all been done voluntarily and at considerable expense, in a spirit of full cooperation with the Office of Price Administration and with its aims and policies"; that "the defendant has improved its system of control so that the indication is that there will be no further violations except such as may be caused by human frailties"; that "no one has suggested to the defendant how its present method of compliance can be made better"; and that "an injunction would have no effect by way of insuring better compliance in the future", "would be unjust to the defendant", and "would not be in the public interest", nevertheless Section 205(a) of the Act requires that upon a finding of a violation of the Act or a regulation issued thereunder the court is deprived of all discretion and must issue an injunction as a matter of course without regard to any equitable considerations.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the Emergency Price Control Act of 1942 (Act of January 30, 1942, c. 26, 56 Stat. 23, 50 U. S. C. Sec. 901) and the General Maximum Price Regulation (7 Fed. Reg. 3153, April 30, 1942) were set out in the appendix to the appellee's brief in the court below and are included in the Record in this Court (R. 596-602).

STATEMENT

This is a proceeding by which the Price Administration seeks an injunction against The Hecht Company, a Washington, D. C., department store, to restrain it from violating the General Maximum Price Regulation (7 Fed. Reg. 3153) promulgated under the Emergency Price Control Act of 1942 (56 Stat. 23). Upon the filing of the complaint on December 8, 1942 (R. 1) a temporary restraining order was entered *ex parte* (R. 6-7). By agreement the case was then advanced and tried on the merits (R. 9-10). After the trial, the District Court dismissed the complaint and dissolved the temporary restraining order (R. 455). Its findings of fact and conclusions of law (R. 447-454) present a rather complete picture of the case as found by the court after a trial of several weeks, and are therefore set out in full, as follows.[1]

1. Leon Henderson, the original plaintiff, was the Price Administrator. During the progress of the trial he resigned, and Prentiss M. Brown, his successor in that office, was substituted as plaintiff.

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[1] The references to the record (the Appendix to the Administrator's brief in the Court of Appeals) are to some of the testimony supporting the findings.

2. Defendant corporation operates a large department store in Washington, D. C. The store enjoys an excellent reputation, and its business has grown from a volume of about $500,000 in 1894 to about $20,000,000 in 1942. (R. 427).

3. The Emergency Price Control Act was approved January 30, 1942, and, prior to the promulgation of the General Maximum Price Regulation the application of which is involved in these proceedings, The Hecht Company had already taken steps to prepare itself for compliance with whatever price control regulations might be issued. (R. 76, 122-123). One of its executives had gone to Canada to study and report on the Canadian system of price control. (R. 428). The Hecht Company had created a new section known as the Price Control Office with office space set aside within the store which was to be devoted entirely to price control. (R. 122-123). This was headed by Mr. Robert Levi, a well educated and well trained employee who had a wide knowledge of the operation of the store. (R. 75-76, 427-428). Mr. Levi was told to employ such persons as were necessary and was given an unlimited budget. (R. 80, 429, 433-434). He organized his section and assumed the direction of compliance with certain price regulations relating to nylon hose, household mechanical refrigerators, and household vacuum cleaners which had been put in effect prior to the promulgation of the General Maximum Price Control Regulation. (R. 76).

4. Prior to the promulgation of the General Maximum Price Control Regulation, The Hecht Company had also made evident its desire to cooperate with the Office of Price Administration. (R. 78, 135, 430). Its store was made available to members of the staff of the

Office of Price Administration on numerous occasions, and Mr. Dulcan, the general manager, proffered the store and its personnel as a testing or proving ground or laboratory, in which the Office of Price Administration might check or experiment with any regulation which might be issued. (R. 134-135, 429-430). The Hecht Company staff prepared drawings which were used as illustrations in a bulletin later issued by the Office of Price Administration. (R. 420-422).

5. General Maximum Price Regulation, promulgated by the Price Administrator, was dated April 28, 1942, was published in the Federal Register April 30, 1942, and was to become effective as to manufacturers on May 11, and as to retailers on May 18, 1942. It provided that a seller's maximum price for any commodity should be, in those cases in which the seller dealt in the same or similar commodities during March 1942, the highest price charged by the seller during March 1942 for the same commodity, or if no charge was made for the same commodity, for the similar commodity most nearly like it, and in those cases in which the seller did not deal in the same or similar commodities during March 1942 the highest price charged during that month by the most closely competitive seller of the same class for the same commodity, or if no charge was made for the same commodity for the similar commodity most nearly like it. It was provided that for the purpose of the regulation the highest price charged by a seller during March 1942 should be the highest price which the seller charged for a commodity delivered by him during March 1942, or if the seller made no such delivery during March 1942, his highest offering price for delivery during that month. It was provided that in cases where the same or similar commodi-

ties had not been sold by the seller or by his competitors the seller's maximum price should be determined by the seller selecting from the same general classification and price range as the commodity being priced the comparable commodity for which the seller could establish a price and of which the seller delivered the largest number of units during March 1942, that the seller should divide his maximum price for that commodity by his replacement cost of that commodity, and should multiply the percentage so obtained by the cost to him of the commodity being priced, and that the resulting figure should be the maximum price of the commodity being priced. The regulation also provided that a seller should preserve existing records relating to prices for commodities delivered during March 1942, and offering prices during that month; that he should prepare prior to July 1, 1942, and thereafter keep for examination, a statement showing the highest prices charged for commodities delivered during March 1942 and offering prices for delivery during that month together with an appropriate description or identification of each such commodity; and that he should keep records relating to the prices charged for commodities sold after the effective date of the regulations and records showing the basis on which he determined maximum prices for those commodities. The regulation also provided that in the case of certain commodities designated as cost-of-living commodities and listed in an appendix to the regulation every seller should on and after May 18, 1942, mark the maximum price of such commodity on the commodity or post such price in the store, and that lists of such commodities with the maximum selling price and with appropriate descriptions should be filed in the Office of Price Administra-

tion on or before June 1, 1942,[2] and thereafter kept up to date by monthly supplements. (7 Fed. Reg. 3153).

6. Mr. Levi secured an advance copy of General Maximum Price Regulation, several days before it was formally published, and immediately mapped out and put in effect a series of moves to bring The Hecht Company into compliance. (R. 80-82). This work had to be done rapidly because of the limited period of time after April 28, 1942, the date of the promulgation of the General Maximum Price Regulation and before May 18, 1942, the date on which the maximum prices were to become effective and the posting made (R. 95, 98), and before June 1, 1942, when the list of cost-of-living commodities was to be filed. (R. 95, 106-107). The Washington store of The Hecht Company contained 107 selling departments, each of which was in effect a small store. (R. 433). The head of each department was called a "buyer", some of whom had charge of more than one department. (R. 77-78, 432-433). It was the duty of the buyer to order the goods for his department, to price them, to sell them, and generally to manage the department. (R. 77-78, 432-433). The primary responsibility for compliance with the various aspects of the regulations was placed on the buyers in the various departments. (R. 18-19, 98-99, 124, 145, 432). This was the only course that could have been followed, since only the buyers were sufficiently well acquainted with the stock and the operation of their departments to be able to determine what deliveries had been made in March, 1942, and at what prices, and to compare the articles on hand with the articles delivered in March. (R. 98-99, 145-146).

[2] By a bulletin issued May 22, 1942, this date was extended to July 1, 1942 (R. 95, 107).

To insure that the buyers accepted and fulfilled the responsibility thus imposed upon them, Mr. Levi interpreted the regulations and applied them to the particular problems of the store, prepared and distributed memoranda and forms (R. 18-19, 82, 85-91, 96-101, 103-105, 107-111, 113-114, 136-137, 139, 150-154), conducted frequent meetings of the buyers (R. 78-79, 81, 92-94, 103, 135, 144-146, 155-156, 430), answered questions (R. 93, 96-97), and in general made the buyers aware of what had to be done to comply with the regulations and kept track of their performance. (R. 116-117). Mr. Levi devoted all of his time to this work and he had seven assistants who devoted all of their time to it. (R. 97). He kept closely in touch with developments at the Office of Price Administration (R. 168, 149-150, 154-155), and subscribed to a number of services which kept him informed of new regulations and interpretations. (R. 79). About June 20, 1942, Mr. Levi resigned to become an Ensign in the United States Coast Guard (R. 75, 122), and his place was taken by Mr. Etelson (R. 17, 19), who had been with the store for many years (R. 133, 433) and was well qualified to carry on the work. (R. 132-134, 433). Mr. Etelson had been prepared for the post by Mr. Levi for about a month before Mr. Levi left the store. (R. 135-136). From the time he replaced Mr. Levi, Mr. Etelsosn continued the program of educating and supervising the staff of The Hecht Company in order to insure compliance with the regulations of the Office of Price Administration. (R. 136-137, 144-157).

7. Notwithstanding the work of Mr. Levi and Mr. Etelson the buyers made mistakes. (R. 158, 160). The Washington store of The Hecht Company has approximately two thousand employees (R. 425). Its inventory of January 30, 1942, showed in excess of one mil-

lion two hundred thousand items of merchandise (R. 401); it had between January 1, 1942, and November 1, 1942, some fifty-four thousand and thirty transactions in the furniture departments alone. (R. 336). A transaction includes any number of items bought by a customer at the time of the transaction. The application of the regulations to the pricing of a particular article often involved interpretation of the regulations as well as exact knowledge of the nature of the article, whether the same or similar articles had been delivered in March 1942, etc. (R. 106-107, 110-113, 131-132, 134-135). The buyers were merchants who were not trained in such interpretation. (R. 77, 124, 432). The correct pricing of the articles was made difficult by the novelty of the regulations (R. 78, 134-135), by the large volume of articles (R. 401), by the fact that the comparisons were with deliveries two months before as to which it was often hard to find adequate records. (R. 249-251). The buyers were further confused, and the work of Mr. Levi and Mr. Etelson and the Price Control Office of the store was made much more difficult, by the fact that there were numerous other regulations of the Office of Price Administration (R. 99-103, 108, 116, 125-126, 136, 148-152, 192-193), many of which in whole or in part were applicable to the store (R. 100), and which were all different from General Maximum Price Regulation (R. 100-101, 108-110), and many of which differed from each other in their method of determining prices (R. 103, 136-140, 150-152), including regulations relating to summer seasonal commodities, women's, girls' and children's outwear garments, men's and boys' tailored clothing, women's fur garments, fall and winter seasonal commodities, bed springs, waterproof rubber footwear, stirrup pumps, phonograph records,

paper products, corded yarn garments, and women's silk hosiery (R. 99-100, 114-116), and in addition were numerous amendments issued from time to time by the Office of Price Administration of not only the General Maximum Price Regulation but also of the other Maximum Price Regulations. (R. 139-142). Mistakes in pricing were caused by difficulties and delays in determining what articles had been delivered in March and at what prices (R. 196-197, 236-237, 243-246, 287-289), occasionally errors would be made because of human mistakes in listing, typing or copying (R. 143, 175-178, 203, 234, 240-241, 249, 252, 256, 259, 294-295), and in some instances the buyers permitted articles to be sold before the proper price had been established for them. (R. 287-289). In a few instances buyers erroneously believed the prices could be equalized so that items of the same value would not be sold at different prices. (R. 162, 178, 186-187, 216-219). Mistakes were made in listing owing to the fact that some of the buyers misinterpreted the requirement for listing all items sold or delivered for sale in March, and listed only a representative selection of goods showing each price range, style and cost, but not each source or style number, and the same misunderstanding caused the omission of items newly received which were similar to items already listed. (R. 158-159, 181, 215). In one department a buyer, whose listing was otherwise quite complete, erroneously believed that slippers, play shoes, and rubbers were not cost-of-living commodities and that they did not have to be listed. (R. 203, 205, 209). These mistakes in pricing and listing were all made in good faith and without intent to violate the regulations. (R. 141-142, 190-191). The performance of the store as to posting was excellent. (R. 117-121, 224-228, 404-420).

8. In the latter part of September 1942, the Office of Price Administration commenced an investigation which continued for approximately six weeks and in which ten people took part from time to time. (R. 17, 20, 74-75). The Hecht Company gave the investigators every possible help, and made available for assistance to the investigators its own personnel, including Mr. Etelson, the Price Control Administrator of the store, and the buyers in the departments which were under investigation. (R. 18, 157, 181, 434, 437-438). The services of such people were quite largely utilized by the investigators. The investigation disclosed that buyers had made the mistakes set forth in the preceding paragraph. The complexity of the subject caused the investigators sent by the Office of Price Administration also to make numerous mistakes in their report. (R. 157, 160, 173-174, 176, 178-179, 207, 250, 290, 301-303).

9. The mistakes brought to light by the investigation were at once corrected (R. 142-144, 182-183, 187, 190, 203, 214-215); and vigorous steps were taken by The Hecht Company to prevent recurrence of these mistakes or further mistakes in the future. (R. 282 ff., 377-378, 437). Mr. Etelson's staff was increased several times (R. 143, 156, 286, 434), until it reached the number of twenty-eight employees who were engaged under his direction in seeing that the store complied with the regulations as to price control. (R. 156-157, 286 424-425). New methods of control were instituted so that by early November 1942 the system was as follows (R. 230-235, 282 ff.): Copies of all orders for articles go to the store's price control office. If it is a re-order of an article already registered at the price control office the buyer must put on the copy in green ink the page and line number at which the article is registered

in the ceiling price book. If the order is for a new article the order must have attached to it a form supplied by the store which indicates the basis of the comparison in accordance with the procedure outlined in paragraph 5, supra, or the method of establishing the ceiling price for the new item if it is covered by a regulation other than the General Maximum Price Regulation. The price control office checks the form to see that it is properly filled out, that the article upon which the comparison is based is listed, and at the price as indicated on the form, and that the comparison appears to be a proper one. Where goods are ordered to be sold in the future and the price cannot be established at once the form is left blank, and a statement is attached that the goods must not be brought from the warehouse to the store until the buyer has been notified and a ceiling price established. After a copy of the order has gone through the price control office it goes to the invoice office to be held until the merchandise arrives. It is then matched against the merchandise, and the invoice office puts on the invoice in red ink the retail price and in green ink the ceiling price and then sends the form back to the price control office, thus showing that the goods have arrived and have been priced. The invoice then goes to the markers, who make up the price tickets and put on them the retail and ceiling prices. The price tickets are then affixed to the items. No article can go on the floor of the store until all this has been done. Moreover, although the regulations provide that the ceiling price need be stated only on cost of living commodities the store is now putting the ceiling price on every article that comes in. The payroll of the price control office for the week ending December 19, 1942, had reached the sum of $853.00

for employees who devoted all their time to that work. Taking the proportion of the time of other employees which was devoted to this work the additional sum of $1,267.50 was expended at that time weekly by The Hecht Company in complying with the regulations. (D. Ex. 78; R. 424 et seq.).

10. It has always been the policy of The Hecht Company to give a customer credit for any overcharge which may have been discovered by the store, and The Hecht Company is making repayment of all overcharges brought to light by the investigation in case of customers who can be identified. The Company proposes to contribute to some local charity the amount of any such overcharges which cannot thus be allocated. (R. 437).

11. December 8, 1942, Leon Henderson who was then the Price Administrator instituted this suit, asking that this defendant be enjoined from violating the General Maximum Price Regulation or any regulation adopted pursuant to the provisions of the statute establishing maximum prices or requiring the making or keeping of records or the making of reports. The defendant received no warning before the institution of the suit. (R. 122-123, 437). There has never been any refusal by the store or any of its employees to comply with any orders or requests of the Office of Price Administration. (R. 122-123, 434 et seq.).

12. The defendant and its employees have attempted, in good faith, to comply with the act, and have taken vigorous steps to do so. (R. 155-157). The compliance thus resulting has been very substantial. (R. 157). Violations have occurred, but they have not been numerous in view of the difficulties involved in the defendant's efforts to comply. There were no wilful

violations. Mistakes have been corrected as soon as discovered (R. 142-144), and vigorous steps have been taken to insure against their happening again (R. 153-154, 230-235), and to combat the difficulties which arise from human frailty. These acts have all been done voluntarily and at considerable expense (R. 422 et seq.), in a spirit of full cooperation with the Office of Price Administration and with its aims and policies. (R. 117, 144, 431-434). The defendant's system of control has been greatly improved (R. 230-235, 282 ff.), and no one has suggested to the defendant how its present method of compliance can be made better. (R. 122-123, 234). An injunction would have no effect by way of insuring better compliance in the future, and would be unjust to the defendant. An injunction would not be in the public interest.

Based on the foregoing findings, the court entered conclusions as follows (R. 1185-6):

1. Section 205(a) of the Emergency Price Control Act of 1942 does not require this Court automatically to issue an injunction in any case where violations of the statute are shown or admitted.

2. The purpose of an injunction is to deter rather than to punish, and an injunction should not issue unless thereby better compliance with the law may be enforced. Each case must be measured and decided according to its own circumstances, and the Court may exercise its discretion in accordance with the equities of the case.

3. The complexity of the regulations and the difficulty of compliance are not in themselves defenses in this case, but may be considered in connection with other evidence bearing on the extent of the defendant's efforts to comply.

4. Where the defendant has made a determined effort to comply with the regulations issued under the Emergency Price Control Act of 1942, and where violations were the result of errors on the part of employees of the defendant made in good faith, and where the attitude of the defendant is not antagonistic, but is cooperative, and where the defendant has improved its system of control so that the indication is that there will be no further violations except such as may be caused by human frailties, an injunction would be unjust to the defendant and would not be in the public interest and this court should decline to issue an injunction.

On appeal by the Price Administrator, the Court of Appeals for the District of Columbia, by a divided Court, reversed the decision of the District Court on July 22, 1943 (R. 616).[3] The Court felt compelled to reverse on the theory that under Section 205(a) "an injunction or other order is to be granted as of course when violations of the Act are found" (R. 607).

On August 11, 1943, the Court below stayed its mandate pending a determination by this Court, provided that the petition for certiorari were filed by September 2, 1943.

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[3] It may be noted that the results of the two decisions below are singularly inconclusive. By reason of the fact that one of the majority justices in the Court of Appeals was a District Judge the issue in this case has been passed upon by two District Judges and two Justices of the Court of Appeals, and in each group there has been an even division of opinion.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

(1) In holding that Section 205(a) of the Act removed all discretion from the District Court and made it mandatory that an injunction be granted when a violation of the Act is found.

(2) In holding that the District Court was required to issue an injunction against petitioner upon the facts found in this case.

(3) In reversing the judgment and order of the District Court.

REASONS FOR GRANTING THE WRIT

1. The instant case presents a question of the utmost importance in the interpretation of a major war statute—a question which has not been, but which should be, decided by this Court. Probably no statute in recent times has had such widespread application to almost every aspect of our national life as the Emergency Price Control Act of 1942, the statute here involved. Moreover, because the issue in the instant case is the manner in which the courts are to aid in enforcing any and all of its provisions by injunctive process, perhaps no single issue arising under that statute will have such widespread effect as that involved in the present case.[4]

Section 205(a), relating to injunctions, provides as follows:

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[4] In a motion to advance the case for trial counsel for respondent Administrator stated: "The case involves a question of great public importance with respect to the administration of the Emergency Price Control Act of 1942. It is highly desirable in the administration of that Act and in the entire effort by the plaintiff Administrator that the case be finally decided as soon as possible."

> "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such a person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

The majority of the court below has adopted the Administrator's extreme construction of this section. It has made the statute, in effect, a punitive, not an injunctive, measure. An injunction must always issue, the majority below concluded, not because of the probabilities of *future* harm to the public interest, but solely because of the fact that an unintentional violation of the statute or the multifarious regulations issued under it has occurred in the *past*. In the words of the majority opinion (R. 607):

> "The phrase 'a permanent or temporary injunction, restraining order, or other order shall be granted', in its context, means in our opinion that an injunction or other order is to be granted as of course when violations of the Act are found."

Of course, under this interpretation, the federal equity courts are shorn of every vestige of discretion or equitable power under this Act. Their function becomes that of criminal courts—to determine a past violation—and the injunction becomes purely a penalty. Indeed, in the view of the majority below, the court lacks even the discretion accorded to a criminal court; the

latter may suspend sentence, but the equity court has no choice but to punish, no matter what the circumstances may be.

We submit that the view of the majority is in error, and that the dissenting Justice below was correct. In his view, and in ours, the purpose of an injunction is to deter rather than to punish, an injunction should not issue unless thereby better compliance with the law may be enforced, and a court of equity has discretion under the statute to act in each case as the equities require.

Hitherto, at least, in public as well as private litigation, it has been axiomatic that injunctions have been *framed and issued* in terms of the court's judgment of the necessities of the future. The court in *Fleming* v. *Phipps*, 35 F. Supp. 627 (D. Md. 1940) stated: "It would seem to be elementary that the purpose of an injunction is to deter rather than to punish." The same view is stated in *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. (2d) 395, 397 (C. C. A. 10th, 1943):

> "An injunction may not be employed to punish past violations, or to simply establish that violation had occurred. Its function is to stop existing violations or prevent further infractions if there is reason to believe that they may occur."

Decisions to the same effect are numerous in both the Federal and state courts. See, *e.g.*, *Swift & Co.* v. *United States*, 276 U. S. 311, 326 (1928); *Shore* v. *United States*, 282 Fed. 857, 859 (C. C. A. 7th, 1922); *Blease* v. *Safety Transit Co.*, 50 F. (2d) 852, 856 (C. C. A. 4th, 1931); *American Mercury* v. *Chase*, 13 F. (2d) 224, 225 (D. Mass. 1926); *Fleming* v. *National Bank of Commerce*, 41 F. Supp. 833 (S. D. W. Va. 1941); *Walling* v. *Builders' Veneer and Woodwork Co.*, 45 F. Supp.

808 (E. D. Wis. 1942); *Nann* v. *Raimist*, 255 N. Y. 307, 174 N. E. 690, 694 (1931); *Exchange Bakery & Restaurant Inc.* v. *Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927); *Longshore Printing & Pub. Co.* v. *Howell*, 26 Ore. 527, 38 Pac. 547 (1894); *Parkinson Co.* v. *Building Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908); Joyce, *Injunctions* (1909) Sec. 41.

The decision of the majority below that Congress in the Emergency Price Control Act jettisoned all prior doctrines and embarked upon a radically different course is based upon the use of the words "shall be granted" in the clause in Section 205(a) which states that "upon a showing by the Administrator that such person has engaged or is about to engage in any such [illegal] acts or practices a permanent or temporary injunction, restraining order or other order shall be granted without bond." The combination of the disjunctive use of "has engaged" and "shall be granted" is advanced as proof that under the Emergency Price Control Act, "an injunction is to punish rather than to deter." The context and the legislative history fail to bear out any such extraordinary result.

Under the Act, a judgment at law may be obtained by showing simply that a violation has occurred, and treble damages are provided. Section 205(e), R. 597. A criminal penalty may be assessed, but only where wilful violation is shown. Section 205(b), R. 597. We believe that the proceeding for an injunction, which must be brought in a court of equity under Section 205(a), occupies a middle ground where the court has discretion to consider the equities of the particular case and to enter such decree as may seem proper.

Moreover, Section 205(a) itself is by no means as categorical as the court below indicates. Section 205(a) says that "a permanent or temporary injunction, re-

straining order *or other order* shall be granted without bond." By the inclusion of the words "or other order" the court presumably is left free to enter such order as the equities of the case may require, either by granting an injunction as to some of the acts complained of, or as to some of the defendants, or by dismissing the case entirely, as was quite properly done by the District Court in this case. The implication by the court below (R. 607) that the phrase "or other order" refers solely to an *affirmative* order is plainly hypothesis. Although it is a possible construction of the phrase, it seems obvious that if Congress had intended to tie the hands of the equity courts and, contrary to all precedent, deprive them of every vestige of discretion, it would have used language which could have left no doubt as to its intention—such as "a permanent or temporary injunction or restraining order must be granted", or "a permanent or temporary injunction or restraining order or other order enforcing compliance must be granted." This it did not do.

Nor is the use of the word "shall" in the phrase "shall be granted" adequate to sustain the decision below. "Shall" is not necessarily mandatory. When it is used in a grant of authority by the legislature to the judiciary, it is ordinarily not mandatory, but is the equivalent of "may". *Becker* v. *Lebanon & M. Ry. Co.*, 188 Pa. 484, 41 Atl. 612 (1898); *Cairo and Fulton Railroad Co.* v. *Hecht*, 95 U. S. 168 (1877); *United States ex rel etc.* v. *Coe*, 67 App. D. C. 207, 91 F. (2d) 238 (1937); *In re Laub*, 343 Pa. 86, 21 A. (2d) 575 (1941); *In re Supervisor of Nether Providence Tp.*, 215 Pa. 119, 64 Atl. 443 (1906); *Clancy* v. *McElroy*, 30 Wash. 567, 70 Pac. 1095 (1902); *Fagan* v. *Robbins*, 96 Fla. 91, 117 So. 863 (1928); Black, *Interpretation of Laws* (2d ed.) p. 553.

The legislative history of the provision is not as full as it might be, but it bears out our interpretation of Section 205(a), under which the court has discretion to enter the order which is required by the equities of the case. The Senate Committee which reported Section 205(a) in its final form, stated in its report (Sen. Rep. No. 931, 77th Cong., 2d Sess. p. 10):

> "(c) *Suits to enjoin violations—In common with substantially all regulatory statutes,* the bill authorizes the official charged with the duty of administering the act to apply to any appropriate court, State or Federal, for an order enjoining any person who has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of the bill. *Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case.*" (Italics ours).

In the face of that language, which places the injunctive provisions in the same category as "all regulatory statutes", and which states that the courts are to enter whatever order is proper "*to enforce compliance*", little if any weight can be attached to the unexplained and probably stylistic change made by the Senate Committee, upon which the Administrator strongly relies. This change was simply the omission of the phrase "upon a proper showing" in the House draft of the bill, which had stated that "upon a proper showing a permanent or temporary injunction, restraining order, or other order shall be granted without bond." Certainly "substantially all regulatory statutes" leave the court some discretion in determining whether an injunction shall issue—or, in other words, leave the court a court of equity. See, *e. g., Walling* v. *T. Buettner & Co.*, 133 F.

(2d) 306 (C. C. A. 7th, 1943); *Fleming* v. *National Bank of Commerce*, 41 F. Supp. 833 (S. D. W. Va. 1941); *United States* v. *United States Steel Co.*, 251 U. S. 417; 452 (1920); *Securities & Exchange Commission* v. *Lawson*, 24 F. Supp. 360 (D. Md. 1938); *United States* v. *Adler's Creamery*, 107 F. (2d) 987, 990 (C. C. A. 2d, 1939) and 110 F. (2d) 482 (C. C. A. 2d, 1940); *Federal Trade Commission* v. *Civil Service T. Bureau*, 79 F. (2d) 113, 115 (C. C. A. 6th, 1935). Certainly the Court of Appeals admits that the order which it says must be entered is not one necessary "to enforce compliance". Whatever the reason for the change by the Senate Committee, the Committee's report, quoted above, establishes that it was *not* what the court below thought it was: a drastic and unprecedented withdrawal of all discretion from the equity courts, and the transformation of an injunction into a pure penalty. The majority of the Court of Appeals must have been unaware of the direct inconsistency between the language of the Senate Report—in common with substantially all regulatory statutes"—and the concluding passage of its opinion—"the limitation upon the court's discretion is unusual, * * *" (R. 611). Yet the inconsistency indicates how widely at variance are the decision below and the consequences which Congress intended.

Both on the context and on the legislative history, we submit that the dissenting judge below was correct in concluding (R. 613):

> More than appears, I think is necessary to justify the assumption that Congress intended to coerce judicial action and to destroy judicial discretion and hence to require an injunction to issue, even where the court finds, as it did here, that the facts

are such that to do so would accomplish no other result than is already accomplished by the voluntary action of the defendant.

Particularly is this so when the construction for which the Administrator contends, and which was adopted by the majority of the court below, raises serious questions with respect to the status and functions of equity courts in the federal system. By long tradition, equity courts have been able to exercise discretion, to render a decree consonant with all of the facts and circumstances—in other words to do equity. Under Article III, Section 2 of the Constitution, the lower federal courts are given a jurisdiction which extends to "all cases in equity arising under the laws of the United States." Jurisdiction can be removed entirely from the Federal courts, as in the Norris-LaGuardia Act, but there is grave doubt whether it can be circumscribed to the extent that Congress can *require* the issuance of an injunctive order when it is the judgment of the court that it should not issue and that it would serve no useful purpose. But whether the issue be phrased in constitutional terms is unimportant. What is important is that the decision below works a far-reaching revolution in our judicial structure. We believe, with the dissenting judge below, that far more than appears is necessary to justify a belief that Congress had so lost faith in the judgment of the American judiciary.

2. The instant decision is the first in a court of appeals involving the construction of Section 205(a). Hence there is no conflict of authority in the Circuit Courts of Appeals in cases involving that Section. We submit, however, that the decision is in conflict with the principles established by many decisions under other regulatory statutes in which the Circuit Courts

of Appeals have held that the purpose of an injunction is to deter, rather than to punish—a principle diametrically opposed to the view of the majority below. For example, the decision below is directly contrary to the statement by the Circuit Court of Appeals for the Seventh Circuit in *Walling* v. *T. Buettner & Co.*, 133 F. (2d) 306, 308 (1943):

> "A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued before the suit for injunction was brought, and where there is no evidence that the offense is likely to be repeated in the future. * * * Employers who are acting in good faith and endeavoring to comply with the law should not be harassed by the processes of a court of equity coercing them to do what they are willing to do and are trying to do voluntarily."

See also the cases cited pp. 21-22, *supra*. There is no decision under any other statute, so far as we know, that is in accord with the present decision of the majority of the Court of Appeals.

Moreover, as already indicated, the fact that the Emergency Price Control Act of 1942 applies to practically all business activity in this country, and that Section 205(a) provides one of the major enforcement provisions for every part of the Act and of all the regulations under it, make it apparent that many cases such as this will arise. Under the circumstances, a decision by this Court now will avoid the necessity of much litigation which might occur before a conflict developed. There are already many decisions in the District Courts. Eight of them have held in accord with the District Judge in the present case, that the federal equity courts have discretion to apply equitable principles in spite of the fact that violations have been

shown or have been admitted, and are thus in direct conflict with the decision of the majority of the Court of Appeals. *Brown, Administrator v. Southwest Hotels, Inc.*, (D. Ark.) (unreported); *Price Administrator* v. *Manneback*, (N. D. Ill.) (unreported); *Henderson* v. *Sonken-Galamba Corp.*, 1 Price Control Cases, par. 50,901 (W. D. Mo. 1942); *Brown* v. *Quinlan, Inc.*, (N. D. Ill.) (unreported); *Brown* v. *Russell Packing Co.*, (N. D. Ill.) (unreported); *Brown* v. *El Paso Iron & Metal Co.*, (W. D. Texas) (unreported); *Brown* v. *Houston Hide & Fur Co.*, (S. D. Texas) (unreported); *Brown* v. *May Hardwood Co.*, (W. D. Ky.) (unreported). One more has a dictum to the same effect. *Henderson* v. *J. B. Beaird Corp.*, 1 Price Control Cases, par. 50,931 (W. D. La. 1943). One has a dictum in accord with the majority of the Court of Appeals, but the case is wholly different on the facts, since the court specifically found that the defendants there were determined not to comply unless forced to do so. *Henderson* v. *Baldwin*, 1 Price Control Cases, par. 51,711 (W. D. Pa. 1942). Only one district court decision thus far appears on the facts to be in accord with the Court of Appeals in the present case, but the decision, which was on a motion for summary judgment, does not give enough information to show what the equities were. *Brown, Administrator* v. *Society Brand Hat Co.*, 1 Price Control Cases, par. 50,965 (E. D. Mo. June 17, 1943). The Office of Price Administration, which has supplied us with the references to many of these decisions, indicates that appeals are now pending in at least three Circuit Courts of Appeals, and possibly in a fourth. Certainly there is every reason why this Court should proceed at once to settle the issue which is common to all of these cases.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals of the District of Columbia be granted.

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